EXTRA-TERRITORIAL VALIDITY OF A DIVORCE GRANTED UPON SERVICE BY PUBLICATION.—By its decision in *Thomson* v. *Thomson* (U. S. Sup. Ct. Jan. 6, 1913), not yet reported, the Supreme Court of the United States has again passed upon the question of the extent to which the full faith and credit clause of the Federal Constitution[1] makes it obligatory upon one State to recognize a divorce decreed by another against a non-resident defendant without personal service of summons within the jurisdiction. The parties were married in Virginia, where they had their matrimonial domicile, and where, after the wife had abandoned him, the husband by publication procured a decree of divorce. The wife sued in the District of Columbia for separate maintenance. The court held that the Virginia decree, being entitled to full faith and credit, was a bar to the wife's action. This decision implicitly follows the case of *Atherton* v. *Atherton*,[2] and thereby destroys all foundation for the view that that case was overruled[3] when the Supreme Court in the case of *Haddock* v. *Haddock*[4] decided that where the husband has unjustifiably sought a separate domicile and there obtained a decree by publication, his divorce is not entitled to the Constitutional protection. The distinction between the two cases is a fundamental one, based upon theories of a wife's domicile. Although in this country a wife who leaves her husband for justifiable cause may gain a separate domicile for the purpose of getting a divorce,[5] for other purposes her domicile remains with her husband.[6] So in *Atherton* v. *Atherton*, as in *Thomson* v. *Thomson*, the wife could not establish a separate domicile except for purposes of instituting divorce proceedings. But in *Haddock* v. *Haddock* it was the husband who deserted the matrimonial domicile, and it was held that, as this desertion was unjustifiable, the wife's domicile for all purposes remained where she and her husband had lived together. The result of these cases is to limit the operation of the full faith and credit clause to cases where both parties are within the jurisdiction of the court granting the decree.

Beyond the limits thus set, the extra-territorial effect to which such divorces are entitled is purely a question of State comity. The bizarre results reached in the various jurisdictions present an irreconcilable tangle. By one view, the suit for divorce is a proceeding strictly *in rem*, the *res* being the marital status; and as the court has jurisdiction of this *res* if the petitioner is domiciled in the State, it may pronounce a decree entitled to universal recognition.[7] By another group of States the proceeding is considered one *in personam*, so that a court cannot, as against a non-resident defendant, grant a decree which will be recognized beyond the borders of its own jurisdiction.[8]

[1] U. S. Const. Art. 4, § 4.

[2] (1901) 181 U. S. 155.

[3] See 18 Green Bag 348; 1 Willoughby, Constitution, 98.

[4] (1905) 201 U. S. 562.

[5] Battershall, Domestic Relations, 81; Hunt *v.* Hunt (1878) 72 N. Y. 217.

[6] See Harteau *v.* Harteau (Mass. 1833) 14 Pick. 181; Ditson *v.* Ditson (1856) 4 R. I. 87.

[7] See Ditson *v.* Ditson *supra;* Van Orsdal *v.* Van Orsdal (1885) 67 Ia. 35.

[8] Olmstead *v.* Olmstead (1908) 190 N. Y. 458; Matter of Kimball (1898) 155 N. Y. 62; Harris *v.* Harris (1894) 115 N. C. 587; Reel *v.* Elder (1869) 62 Pa. 308.

The logical difficulty with the first view is that the very reason for giving universal acceptance to a judgment *in rem,* that a man is charged with notice of what is happening to his property, is not applicable to so intangible a *res* as the matrimonial status;[9] and, therefore, it is unjust to grant a divorce decree against a defendant who may be ignorant of the suit. Still less logical, possibly, is the second view, for it presents the weird spectacle of a man married in one jurisdiction but unmarried in others.[10] It seems that the objections to each of these views would be avoided by taking a middle ground, whereby the proceeding would be considered one *quasi in rem,* the marital status being the *res* before the court; but which would require the plaintiff to bring actual notice home to the defendant in addition to publishing the summons.[11]

New York adheres generally to the view that a suit for divorce is an action *in personam,* holding that a divorce decree procured by publication elsewhere has no effect within that State.[12] In an attempt to extricate themselves from the inconsistencies to which this view his led, the courts of New York have evolved a theory of estoppel which seems to involve results even less consistent.[13] The general statement of the doctrine is that a petitioner who has invoked the jurisdiction of a sister State, and has there obtained a divorce not entitled to recognition in New York, cannot, nevertheless, be heard in a New York court to assert this invalidity. So we have the anomaly of a man, unmarried in other jurisdictions, who has a wife in New York, and in that State can assert neither that he is married nor unmarried. Needless to say, no element of a true estoppel is present, for there is neither representation by the petitioner nor reliance by nor injury to the defendant; nor does the assertion of a continued marital relation attack the jurisdiction of the State rendering the divorce decree, but merely seeks to put upon that decree the same interpretation and the same limitations which the New York courts put upon it.[14] The rescue from this indefensible situation has been postponed by the case of *Simmonds* v. *Simmonds* (1912) 138 N. Y. Supp. 639, a case which well illustrates the hardship on third parties which the estoppel theory purports to avoid. The parties had their matrimonial domicile in Virginia, where the husband abandoned his wife. The wife sued for a divorce in Virginia, and by publication obtained a decree. Then the husband married again, and the first wife sued him a second time for divorce, claiming that his intercourse with the second wife was adulterous. The first wife was held to be estopped to deny the validity of the Virginia decree, on the

[9]Minor, Conflict of Laws, § 91.

[10]See Atherton *v.* Atherton *supra.*

[11]Felt *v.* Felt (1898) 57 N. J. Eq. 101; Doughty *v.* Doughty (1876) 27 N. J. Eq. 315.

[12]McGowan *v.* McGowan (N. Y. 1897) 19 App. Div. 368, aff'd (1900) 164 N. Y. 558; Bull *v.* Bull (N. Y. 1883) 31 Hun 69; Olmstead *v.* Olmstead *supra;* Matter of Kimball *supra.* Of course New York now follows Atherton *v.* Atherton. Hammond *v.* Hammond (N. Y. 1905) 103 App. Div. 437; see Post *v.* Post (N. Y. 1907) 55 Misc. 538.

[13]Starbuck *v.* Starbuck (1903) 173 N. Y. 503; Matter of Swales (N. Y. 1901) 60 App. Div. 599, aff'd (1902) 172 N. Y. 651. These two cases impliedly overrule Holmes *v.* Holmes (N. Y. 1871) 4 Lans. 388.

[14]1 Wharton, Conflict of Laws, (3rd ed.) *237-g.*

ground that any other result would brand the innocent second wife as an adulteress. But this device only half accomplishes its purpose, for though it protects the second wife from the equally innocent plaintiff, still the State, not subject to such an estoppel, could apparently convict her of adultery, and could certainly convict the husband of bigamy.[15] The necessity for all these inconsistencies might be obviated by giving the fullest validity to the decree of a foreign jurisdiction where one of the parties is domiciled, if based upon actual notice to the other.

EQUITABLE CONVERSION AND THE RULE AGAINST PERPETUITIES.—It is a fundamental principle that equity considers as done that which ought to have been done. Accordingly, where land is devised or conveyed in trust to be sold and converted into money, equity will consider it as personalty after the death of the testator[1] or the delivery of the deed,[2] and thus, through the beneficent fiction of conversion, give effect to the intention of the testator or grantor.[3] It is in the settlement of controversies between the heirs and representatives of the testator that this doctrine is generally invoked, but occasionally, as in the recent case of *Peabody et al.* v. *Kent et al.* (1912) 138 N. Y. Supp. 32, a much wider application is sought. The grantor, who was domiciled in Massachusetts, conveyed land in New York to certain trustees in other States with a direction to sell and to set aside the proceeds in a fund for division among certain beneficiaries, a part in five years and the remainder in ten years after the delivery of the deed. Under the law of New York the trust was invalid in that it suspended the power of alienation of the proceeds for a gross term. The grantees claimed, however, that the land had been converted into personalty by the direction to sell contained in the deed, and that the validity of the conveyance was therefore to be determined by the law of the domicile of the owner, under the rules of which the transfer would be upheld. The court, while it assumed that the conversion had been effected, held nevertheless that the law of New York was to be applied, because the trust was to be administered temporarily in that State, and accordingly declared the deed invalid.[4]

Under the assumption taken by the court that the land was to be regarded as personalty, the decision is clearly at variance with the policy heretofore adopted by the New York courts of localizing the effects of the New York rule against perpetuities.[5] In accordance

---

[15] People *v.* Baker (1879) 76 N. Y. 78.

[1] Fisher *v.* Banta (1876) 66 N. Y. 468; 3 Pomeroy, Equity Jurisprudence, (3rd ed.) § 1162.

[2] Loughborough *v.* Loughborough (Ky. 1854) 14 B. Mon. 549; Griffith *v.* Ricketts (1849) 7 Hare 299.

[3] Jarman, Wills, (6th ed.) 743; Page, Wills, § 708. The duty to sell, if not created by express direction, may be implied from the circumstance that the purposes of the trust cannot be carried out unless the land is sold and turned into money. Page, Wills, § 703.

[4] *Cf.* 2 Wharton, Conflict of Laws, (3rd ed.) 1321; Gardner, Wills, 308; Penfield *v.* Tower (1890) 1 N. D. 216. The trustees were allowed, however, to foreclose a mortgage against the defendants, for the heirs of the grantor had not attacked the title acquired by the trustees under the deed.

[5] See Dammert *v.* Osborn (1893) 140 N. Y. 30, 41.